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An eastern exchange calls special attention to a very recent decision of the New York Court of Appeals, in the case of Rodgers v. City of New York, which will doubtless have most important consequences. The suit was brought to recover for work done by the plaintiff under contract with the city, for which payment was refused on the ground that the contractor had not paid the prevailing rate of wages. The Appellate Division of the Supreme Court decided against the city, and that decision has been affirmed by the Court of Appeals, which takes even broader ground than was taken in the court below. It was pointed out by the Court of Appeals that if counsel for the city were right in the position they assumed it must follow that the city might accept and receive the benefit of improvements made by contractors to the extent of thousands of millions of dollars, and though conceding that the work was honestly done, precisely according to the specifications of its contract, yet it might refuse to pay if it were able to show that the contractor had not in the execution of the contract paid to all the workmen employed by him what was called the prevailing rate of wages—in other words, that the city may accept the work and the citizens may enjoy the benefit of it and treat the contract price as something forfeited by the contractors for their benefit. The reasoning that led to such a result, the court says, must at some point be inherently faulty, for it is not possible that such injustice can be sanctioned by the courts of any State where the principles of the common law are recognized.

The court ruled that in so far as the prevailing rate of wages law was invoked to shield the city from the obligation to pay the relator the money due to him, it was not a valid defense for the reason that some of its most material provisions were in conflict with the constitution. In the first place, in its actual operation it permitted and required the expenditure of the money of the city, or of the local property owner, for other than city purposes. In the next place, it invaded rights of liberty and property in that it denied to the city and the contractor the right to agree with their employees upon the measure of their compensation, and compelled them in all cases to pay an arbitrary and uniform rate which is expressed in vague language difficult to define or ascertain, and subject to constant change from artificial causes. Finally, it is invalid because it virtually confiscates all property rights of the contractor under his contract for breach of his engagement to obey the statute, and it attempts to make acts and omissions penal which in themselves are innocent and harmless, and in effect imposes a penalty upon the exercise by the city or by the contractor of the right to agree with their employees upon the terms and conditions of the employment.

The court, in words which may well be pondered by the promoters of certain legislation, announces the doctrine that the legislature does not possess unrestricted power to bind a city hand and foot with respect to all its local business affairs. It cannot, for example, fix by statute the price which it must pay for materials or property that it may need, or the compensation that it must pay for labor or other services that it may be obliged to employ, at least when such regulations increase the cost beyond that which it would be obliged to pay in the ordinary course of business. If, the court said, it could do all these things it could virtually dispose of all the revenues of the city for such purposes as it thought best, and local self-government would be nothing but a sham, a delusion and a snare. The constitutional restrictions upon cities with respect to the expenditure of money would be, the court said, of no avail if the legislature could by mandatory laws compel the officers or the governing body to frame contracts in the interest or for the benefit of individual classes.

NOTES OF IMPORTANT DECISIONS.

MARRIAGE AS AFFECTING CONTRACTS BY WOMEN FOR PERSONAL SERVICES.—In King v. King, 59 N. E. Rep. 111, in the Supreme Court of Ohio, it was held that a contract by which a person agrees to live with and take care of another during his life, and further

agrees not to marry during such service, in consideration of the agreement of the other that he will provide for her amply sufficient to make her comfortable and well off, is not necessarily an invalid contract. Although the promise not to marry is in itself a void promise, as against public policy, yet it is but an incident to the main engagement, which is for labor and care, and, if that service be fully performed, and the recipient fails to perform his engagement during life, the other may maintain an action against his estate on the contract. The court said in part:

"The promise not to marry was a mere incident to the main purpose, emtered into simply because it was supposed that by remaining single the woman could the better perform her contract. It was immaterial to the man whether she married or not, so long as she fulfilled her promise as to care. In other words, the promise to remain unmarried did not enter into or become a part of the substance of the general agreement. That agreement was for the performance of services. If the performance was adequate, and the services rendered in a satisfactory manner, their value could neither be enhanced nor diminished by the fact that they had been rendered by a single woman rather than a married one. So that, had the plaintiff married, yet, if she satisfactorily performed her contract, the recipient of the services would lose nothing by the fact of marriage. As matter of fact she did not marry; whether because of the contract or for reasons wholly apart from it is not material, for she was under no obligation to marry nor to refrain from so doing. She did perform the service. That the verdict and judgment of the common pleas settles to all intents and purposes for the present inquiry. As above stated, the promise not to marry, although void because against public policy, was not illegal as against positive law; and it is not easy to perceive how its presence in the contract, or its observance by her, or both facts, could place the parties in what is termed *in pari delicto—i. e.*, in a position where the law should adjudge them guilty of its violation, and hence refuse relief for that reason in the face of the fact that the claimant had fully performed. In such case the maxim '*In pari delicto melior est conditio possidentis*' has, in reason, no application, and, we think, ought not to have application in law."

MARITIME TORTS RESULTING IN DEATH.

A death resulting from a marine tort inflicted by or on board of either a domestic or foreign vessel, navigating either inland waters, waters navigable from the sea, or the high seas, is justicable, if at all, only by virtue of some statute in force at the place of the infliction of the injury, and applicable thereto, because either the transaction occurs within territory or on board of a vessel, over which it was within the competency of the sovereignty enacting such law, to legislate. The doctrine of the old line of decisions holding that admiralty may entertain a suit of this nature and award damages on general principles of right and justice, without regard to the existence or non-existence of a statute granting a right of action is now obsolete.[1] With the rise of personal injury litigation growing out of modern conditions, an exception to the maxim, *actio personalis moritur cum persona*, was also sought to be drawn in cases where the death was caused by the breach of a common carrier's implied contract for safe carriage;[2] and upon this theory numerous recoveries were sustained in England at the suit of the personal representatives of deceased persons suing on the contract, for damages sustained by their decedents' estates. Upon similar grounds a libel was sustained in favor of an administrator of an infant child, who while on a voyage as a passenger from Liverpool to New York was accidentally poisoned through the carelessness of the officers of the steamship, the cause of action being predicated on the breach of the contract of carriage.[3] The advent of death liability legislation in America wrought the immediate reduction of the loose doctrines formerly prevailing to a fair degree of consistency and certainty. In most of the cases subsequently brought in admiralty, the courts, although laying stress on the equitable principles assigned as the basis of their authority and jurisdiction to award damages for death from a marine tort, ultimately based their award on the familiar provisions of the statutes modeled on Lord Campbell's act.[4] In other courts the competency of a State legislature to create rights enforceable in admiralty where in similar cases at common law, the right of action had been held not to survive, was expressly denied;[5] particularly where the statute invoked was sought to be made the basis of a maritime lien.[6]

[1] Tiffany on Death by Wrongful Act, § 204.

[2] *Id.* § 18.

[3] The City of Brussels, 6 Ben. 370.

[4] See review of such cases in respondent's argument in The Harrisburg, 15 Fed. Rep. 613, *Id.* 7 Sup. Ct. Rep. 140. Note to The Garland, 20 Am. Law Reg. (N. S.) 746, 5 Fed. Rep. 924.

[5] The Ida Campbell, 34 Fed. Rep. 432.

[6] The Sylvan Glen, 9 Fed. Rep. 335.

The decisions of the subordinate courts upon the subject are wholly irreconcilable, and even so late a case as Butler v. Boston & S. S. S. Co.,[7] contains the expression of a serious doubt whether a State law can have force to create a liability in a maritime case at all within the dominion of the admiralty and maritime jurisdiction, where neither the general maritime law nor an act of congress has created such liability. It seems to me that, had the distinction, which is very clear, when stated, between the source of jurisdiction and the source of a right to be enforced, been kept in mind, the recognition of the enforcibility of a cause of action of this nature in the admiralty would not have been so long delayed. I refer now, of course, to causes of action founded on the statute. The proposition which is undoubtedly correct, that a State legislature has no power to confer jurisdiction on a maritime court in respect to a subject not maritime in its nature,[8] is not inconsistent with the enforcement of a right of that nature created by the local law in the admiralty courts of the United States according to their own rules of procedure.[9] Common-law rights are enforced by State and federal courts, although their jurisdiction is not derived from the common law. The same is true of rights created by foreign laws. Generally speaking whether the rights of parties arise out of, and are governed by the common law, by a federal statute, by a State statute, or by foreign law, a State court, if it has jurisdiction of the parties and of the subject-matter of the action, must enforce their rights as they exist under the law that defines them. The federal courts, both in common-law actions and suits in equity conform to this rule. And by a line of decisions in which the question has been presented in each of the modes of procedure known to admiralty, it is now settled that if the statute, local or foreign, establishes the general right to redress, then even though it purports to set forth the remedy, the right being distinct therefrom, may be enforced in admiralty. On the other hand it is equally well settled that in the absence of legislation creating the right of action for death by wrongful act or negligence, the suit in admiralty will not be entertained.[10] Subsequent actions have therefore been based exclusively upon some provision of statute law, with the result that, except for the advantages to be gained from the mode of procedure and equitable principles prevailing in admiralty, the redress granted therein in no respect varies from that obtainable by a common-law action. The decisions sustaining the foregoing general propositions will be now considered and reviewed, grouped with reference to the forums in which redress is sought, as common-law actions, proceedings in admiralty, whether *in personam*, *in rem*, or under the limited liability act.

The constitution invests the federal judiciary with exclusive jurisdiction of all maritime causes, but the ninth section of the judiciary act of 1789 conferring exclusive original jurisdiction of such causes on the district court, expressly saves to suitors the right of a common-law remedy in all cases where the common law is adequate to give it. By reason of this saving clause which has been preserved in subsequent legislation, the jurisdiction of State courts to entertain an action under the statute giving a right of recovery for death, extends to cases occurring on the navigable waters of the United States, even though the cause of action is predicated on death in a collision due to disobedience of the general rules of navigation. But it is essential to recovery under the State statute that the injuries resulting in such death shall have been inflicted within the territorial limits of the State whose statute is invoked.[11] Thus where it appeared that plaintiff's intestate was navigating the waters of Narragansett Bay in a sail boat, and lost his life by means of a collision between the

[7] 130 U. S. 527, 9 Sup. Ct. Rep. 612. Although the supreme court had in *Ex parte* Gordon, 104 U. S. 515, refused to award a writ of prohibition against the district court, sitting in admiralty, in a case wherein a libel claiming damages in such a case, there was no expression of opinion as to whether, on principle the admiralty was empowered to award damages in such a case.

[8] Welsh v. North Cambria, 40 Fed. Rep. 655.

[9] The H. E. Williard, 52 Fed. Rep. 387.

[10] The Harrisburg, 119 U. S. 199, 7 Sup. Ct. Rep 140, 30 L. Ed. 358, reversing 15 Fed. Rep. 612; The Alaska, 9 Sup. Ct. Rep. 461, 130 U. S. 201, affirming 33 Fed. Rep. 107, which reversed 27 Fed. Rep. 704. Also see The Cephalonia, 29 Fed. Rep. 332, and 32 Fed. Rep. 112; Cooper v. Transp. Co., 75 N. Y. 116.

[11] Dougan v. Champlain Trans. Co., 56 N. Y. 1 Tiffany on Death by Wrongful Act, § 199.

steamboat of the defendant and his craft, which was caused wholly through the fault and negligence of the master of the steamboat, the State court having entertained an action brought under the Rhode Island statute in which a judgment of $12,000 was rendered in plaintiff's favor, it was held in the supreme court in an opinion affirming the judgment of the State court, that cases of this character belonged to one of the classes contemplated by the saving clause just mentioned, namely, actions to recover damages for personal injuries, although the action for death by wrongful act was the creation of subsequent legislation.[12] And although congress is exclusively invested with the regulation of interstate commerce, a decision of the supreme court has definitively sustained the authority of a State court to adjudicate upon the rights and liabilities of the parties in a case where the casualty occurred on navigable waters constituting a State frontier, and in the course of interstate commerce, the act resulting in the fatality being wrongful, because in violation of the federal statute, although the resulting death was justiciable, if at all, solely under State law. After critically examining the grounds of the contention that the State statute granting a right of action for death by wrongful act operated as a new burden on interstate commerce, the court held that in the absence of legislation by congress, incorporating the principle of liability for damages resulting from death by wrongful act or negligence, into the statute law of the Union, State statutes of this character would be enforced and applied, whether the injury occurred on land or on water, or in the course of interstate or foreign commerce equally with any other pursuit.[13] The two supreme court decisions just noticed are landmarks in the development of the principles governing the application of the constitutional provisions involved therein, and have permanently set at rest the contention that the grant of admiralty jurisdiction, and of the power to regulate commerce, have ousted State jurisdiction over the subject of this article. And so where the legislation of congress and the constitutions of Minnesota and Wisconsin, adopted in conformity therewith, gave concurrent jurisdiction to both States over the St. Croix river, it was held that an action might be maintained in the courts of Minnesota on the statute of that State for a death inflicted on board a steamboat navigating that river, and that jurisdiction was not affected by the fact that the boat at the time of the accident was on the Wisconsin side of the stream.[14]

The jurisdiction of the State courts in this class of cases has also been asserted against the contention that the cause was of exclusive admiralty cognizance, where the injury was inflicted upon a bay of the sea,[15] upon a lake over which the admiralty jurisdiction of the federal court has been extended by act of congress.[16] And even in a case of injury and death inflicted on the high seas, where it appeared that the vessel in question was registered in the State in and under whose laws the suit was brought, the decedent being a citizen of the same State, a right of recovery was conceded on the ground that, in respect to matters not committed by the constitution exclusively to the federal government or legislated upon by congress, but which are regulated entirely by State laws, a State to which a vessel belongs must be regarded as the sovereignty whose laws follow it until it comes within the jurisdiction of some other government, and that hence such vessel while on the high seas is to be regarded, so far as concerns the operation of such laws, as a portion of the territory of the State.[17] But while entertaining the action as respects a tort committed within its own territory or on board one of its own vessels on

[12] American Steam Co. v. Chase, 9 R. I. 419, affirmed 16 Wall. 522, 21 L. Ed. 369.

[13] Sherlock v. Alling, 93 U. S. 99, affirming 44 Ind. 184. This decision also sustains the contention of the courts of Indiana to concurrent jurisdiction over the Ohio river in this class of cases. And it need not be averred and proved that the killing took place on the Indiana side of the stream within low-water mark. Memphis & C. P. Co. v. Pikey, Admr. (Ind.), 40 N. E. Rep. 527.

[14] Opsahl v. Judd, 30 Minn. 126, 14 N. W. Rep. 575. But no action is maintainable either in State or federal court, at common law or in admiralty, against public officers as such for killing occurring in the course of the enforcement of State laws for the protection of oyster beds. Mister v. State Board, 59 Fed. Rep. 909. And see Riggin v. Same, 59 *Id.* 1005.

[15] Mahler v. Norwich, etc. Co., 35 N. Y. 352.

[16] Dougan v. Champlain Trans. Co., 56 N. Y. 1.

[17] McDonald v. Mallory, 77 N. Y. 546, 33 Am. Rep. 664. On the authority of Crapo v. Kelly, 16 Wall. 610; The E. B. Ward, 17 Fed. Rep. 458.

the high sea, will a State court entertain an action and suffer a recovery based on a foreign statute for a death resulting from a tort committed on board a foreign vessel? There is authority for the affirmative of this proposition also. The courts of New York have held that since the English act of parliament above mentioned has been applied by the English courts to cases arising on British ships on the high seas, and considering the transitory nature of the action, and that there exists a statute in New York of the same general purport, the administrator of a person drowned in consequence of negligence on board a British vessel on the high sea, may maintain an action against the vessel owners in the courts of that State, provided the suit is begun within the time limited by the British statute.[18] It was further held that if the waters on which such vessel lay, were within the territorial dominion of sovereignty other than that to which the vessel belonged, resort would be had to the laws of the sovereignty exercising dominion over such waters rather than to the law of the country of the vessel. Thus where the negligence complained of occurred on board of an English ship, whereby the decedent fell overboard, and was drowned in the bay of Savanilla, United States of Colombia, and the action was brought in the court of common pleas, city and county of New York, under the provisions of Lord Campbell's act, the defendant insisted that the laws of Colombia ruled the case, and as these laws were not alleged or proved, the court should presume the rule of the common law to be the law of the locality, and as the common law gave no right of recovery in such a case, insisted that the case should be dismissed. It appeared from the evidence, that the vessel at the time of the injury was no more than two miles distant from the shore. The court said that the vessel was not upon the high sea, but was within the jurisdiction, and subject to the laws of Colombia, was, upon the authority of the publicists, an undeniable proposition, and that the motion to dismiss should therefore have been sustained.[19] I have been unable to find a more lucid summarization of the doctrine in respect to the enforcement of rights of action accruing under foreign laws, than the following, which I extract entire from the opinion in the case just cited. "That the actionable quality of an alleged wrong depends upon, and is determined by the municipal law of the place of the transaction; that in a suit here, proceeding upon an alleged wrong committed abroad, the court, in the absence of evidence to the contrary, will presume the common law to be the law of the locality; that if by the principles of the common law, such alleged wrong be not the subject of an action for private redress, the plaintiff in order to recover must prove it to be so by the law of the place of the transaction; that by the common law the death of a human being is not the subject of a civil action, and that, by consequence, whoever seeks reparation in our courts for the death of another abroad, must establish by affirmative evidence that such death is an actionable wrong by the law of the place of the occurrence, are now elementary principles in the jurisprudence of the State of New York,"—and I will add, have received general acquiescence in all our State and federal courts, although (as I shall show herein) this doctrine has not been accepted by the admiralty to the extent of authorizing a recovery under foreign law for a death occurring on the high seas.

It is within the competency of the State legislature, as we have seen from the decision in Sherlock v. Alling,[19a] in the absence of regulations by congress, to declare what liability shall ensue from torts resulting in death, by legislation of obligatory force upon citizens within its territorial jurisdiction, whether on land or on water, or engaged in commerce, foreign or interstate, or in any other pursuit. And if under such circumstances the State legislature has given a right of action for death by wrongful act, the statutory claim in the class of cases under consideration may be enforced in admiralty against the proper parties. The question of whether the State or national tribunals have jurisdiction does not depend upon the State or national origin of the right or title in question. If the plaintiff's citizenship is different from that of the defendant, he has a right to

[18] Cavanaugh v. Ocean Steam Nav. Co., 13 N. Y. Supp. 540, and see Robinson v. Same, 112 N. Y. 315, 2 L. R. A. 636.

[19] Geoghegan v. Atlas S. S. Co., 22 N. Y. Supp. 749.

[19a] 93 U. S. 99, affirming 44 Ind. 184.

sue in the federal courts, whether the right he asserts is of State or national origin. For the same reason if a right is of admiralty jurisdiction it is cognizable in the district courts, without reference to the residence of the parties or the origin of the right. It is admitted that the State cannot enlarge the jurisdiction or control the process of the national courts. But certainly it may increase the cases in such courts by enlarging the class of persons and rights included in their jurisdiction. The origin of the right of recovery for death by wrongful act is in the State law, but the nature of it in consequence of the tort that caused the death having been committed upon the public navigable waters, authorizes the party in whose favor it exists to sue in the admiralty court.[20] This case marks a departure from the doctrine formerly prevailing in admiralty. The earlier cases, which are exhaustively cited in the references I have given from Mr. Tiffany's work, disclose a great zeal of federal judges for the maritime law and a preference for the procedure *in rem*, on the theory that the right of action (which they held it better became the humane and liberal proceedings in admiralty to give than to withold, when not required to withold it by established and inflexible rules), by analogy to other marine torts, gives a maritime lien on the vessel as an "offending thing." But here we find the ground of jurisdiction shifted, and in subsequent suits in admiralty to recover damages for death by wrongful act (and these are reported with increasing frequency), the jurisdictional question seems not to have been raised at all.[21] The most thorough and satisfactory discussion of the jurisdictional question is found in the opinion in The City of Norwalk,[21a] in which it was contended that there could be no recovery for loss of life in the admiralty court under the State statute, because as it was claimed, it is not competent for State legislation (1) to change the law in maritime cases, or (2) to extend the jurisdiction of a court of admiralty so as to authorize it to enforce a new and purely statutory cause of action. After considering the subject on principle and authority, the court summarized the results of State legislation by marshalling a lengthy array of instances in which *new legal rights* created by State authority in maritime affairs have been recognized and enforced. The instances adduced show that over quite a wide range of local interests, State legislation is competent to deal with purely maritime subjects, and to create rights and duties which must be recognized and enforced in admiralty, though they may not change any of the characteristics of maritime law. The court's review of the instances disclosing the range of such legislation induced the conclusion that "in at least three classes of subjects, none of them affecting, however, what is peculiar to the general maritime law or touching its international or interstate relations, in which State legislation is competent to affect the rights of parties in courts of admiralty, in the absence of legislation by congress, viz.: (1) In the establishment of the general rights of persons and property within the State limits; (2) in the exercise of the police power; (3) in certain local regulations of a maritime nature. The statute of this State, New York, which authorizes a recovery of the pecuniary damages, in behalf of a widow, husband, children, or next of kin, falls within each of the above classes. (1) It is a general law of personal rights, not specially directed to commerce or navigation, but applying alike on sea or shore; (2) it is within the police

[20] Holmes v. Oregon, etc. Ry. Co., 6 Sawy. 262, 5 Fed. Rep. 75.

[21] Hrebik v. Carr, 29 Fed. Rep. 298, decree for $2,500; Ladd v. Foster, 31 Fed. Rep. 827, decree for $1,500; Holland v. Brown, 35 Fed. Rep. 48, decree for $2,500; The A. W. Thompson, 39 Fed. Rep. 115, recovery denied on ground of decedent's contributory negligence; Grimsley v. Hankins, 46 Fed. Rep. 400, recovery denied on ground that negligence was that of a fellow-servant; The James Berwind, 44 Fed. Rep. 693; *sub nomine* Pa. Ry. Co. v. Daly, 49 Fed. Rep. 959, decree for $5,000 sustained; Cheatham v. Red River Line, 56 Fed. Rep. 248, decree for $2,500; Boden v. Demwolff, 56 Fed. Rep. 846, decree for $1,500; Killien v. Hyde, 63 Fed. Rep. 172, decree for $5,000; The Onoko, 100 Fed. Rep. 477, recovery denied because of failure of proofs; Carlson v. U. N. Y. S. H. Pilot's Assn., 93 Fed. Rep. 468, fellow servant rule applied; Jeffries v. De Hart, 102 Fed. Rep. 765, recovery denied because of failure of proofs. The Oceanic, 61 Fed. Rep. 338, commenced as two common law actions, and afterwards by stipulation agreed to be admiralty causes *in personam* and transferred from the common law to the admiralty side of the court and consolidated for trial. The court estimated damages in conformity with common law rules, and awarded $10,000 for an adult life and $1,000 life of an infant child.

[21a] 55 Fed. Rep. 98, affirmed *sub nomine*, transfer No. 4, 20 U. S. App. 570, C. C. A. 521, 61 Fed. Rep. 364

power; for it is a statute intended to protect life, through one of the most effectual of all sanctions, viz., by imposing on the offender a liability to pay a pecuniary indemnity; while in the interest of the public it also tends to avert the dependency or pauperism of the survivors by shifting the burden of their support, in part, at least, from the community to the authors of the wrong; (3) it is local in its scope, and interferes in no way with any needful uniformity in the general law of the seas, or with international or interstate interests. Its validity, therefore, as applied to maritime affairs within State limits, seems to me clear. This court has jurisdiction of the cause from the nature of the subject, and from the place where, and the causes out of which, the claim arises. The claim is for damages growing out of a tortious collision, through faults of navigation arising on navigable waters of the United States. That is purely a maritime transaction. The case is, therefore, a maritime case, and as such it is within the original field of the jurisdiction of this court as established under the constitution and the judiciary act. The court has authority, therefore, to hear and to determine the cause, whether the law applicable to it entitles the libelant to any damages or not. The latter question is wholly different from the question of the jurisdiction of the court. If the State statute has force to effect this transaction as a maritime case, then this court in hearing the cause must give effect to the State law. If the State act is not competent and has no such force, then this court must disregard it. In either case this court has jurisdiction to hear and determine the cause on its merits as a maritime cause, and is bound to apply whatever law is operative upon it."

When the doctrine was established that no suit can be maintained to recover damages for the death of a human being, independently of a State statute granting a right of action,[22] it became necessary to determine whether the statutory plaintiff was entitled to assert a maritime lien for the enforcement of the statutory claim, or avail himself of the proceeding *in rem* in order to compel the appearance of the defendant. Although such a libel was sustained in the case of The Clatsop Chief,[23] the admiralty courts generally avoided the inconsistency of reviving a lien in aid of a right granted by the State statute while denying the right in whose aid such lien was revived in those cases wherein the statute was silent as to the right asserted.[24] The reasonings from which the conclusion was reached that the libel *in rem* would not lie are based on the failure of the statute to give a lien against the vessel, although some courts go further and deny the power of the State law to give a maritime lien at all. Thus, in the Sylvan Glen,[25] the court said that if maintainable at all the action *in rem* must rest upon the proposition that libelant by virtue of the State statute has a maritime lien upon the vessel. That the statute created no lien, and if it did the power of the State to create a maritime lien would be denied. And in The Manhassett,[26] that the right of an administratrix to damages for injury to her intestate * * * is not a maritime right and is unknown to maritime law. That a State cannot create a maritime right or confer jurisdiction in any particular upon an admiralty court, and that as the right of action to recover such damages does not belong under the admiralty jurisdiction to an administrator, cannot be sustained in an admiralty court.[27] And in the North Cambria that is nothing whatever in the statutes indicative of a purpose to create such lien, and if there was the statute would be held inoperative in this respect, because the subject lies within the exclusive domain of congress.

Such extreme views adverse to the authority of the State legislature to make the right given effective by creating a lien in favor of the statutory beneficiaries did not find expression in the supreme court when the question came before that body as to the power of the district court to entertain a libel *in rem* for damages incurred by loss of life, where by the local law a right of action survives to the administrator or relatives of the deceased, but no lien is expressly created by the act.[28] Speaking for the court Mr.

[22] The Harrisburg, 7 Sup. Ct. Rep. 140.

[23] 8 Fed. Rep. 165.

[24] The E. B. Ward, 17 Fed. Rep. 458; 16 *Id.* 255.

[25] 9 Fed. Rep. 335.

[26] 18 Fed. Rep. 918.

[27] 39 Fed. Rep. 615, affirmed 40 Fed. Rep. 655. And see The Wydale, 37 *Id.* 716, and The Ida W. Campbell, 34 *Id.* 432.

[28] The Corsair, 12 Sup. Ct. Rep. 949, 145 U. S. 335, 36 L. Ed. 727.

Justice Brown said: "A maritime lien is said by writers on maritime law to be the foundation of every proceeding *in rem* in the admiralty. In much the larger class of cases the lien is given by the general admiralty law, but in other instances—such, for example, as insurance, pilotage, wharfage and materials furnished in the home port of the vessel, the lien is given if at all, by the local law. As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a lien upon the offending thing. If it merely gives a right of action *in personam* for a cause of action of a maritime nature, the district court may administer the law by proceedings *in personam*, as was done with a claim for half pilotage dues under the law of New York in the case of *Ex parte* McNiel,[29] but unless a lien be given by the local law there is no lien to enforce by the proceedings *in rem* in the court of admiralty. The Louisiana Act declares in substance that the right of action for every act of negligence that causes damage to another shall survive in case of death, in favor of the minor children or widow of the deceased, and in default of these in favor of the surviving father or mother, and that such survivors may recover damages sustained by them in the death of the parent, child, husband, or wife. Evidently nothing more is here contemplated than an ordinary action according to the course of the law as it is administered in Louisiana. There is no intimation of a lien or privilege upon the offending thing, which, as we have already held, is necessary to give a court of admiralty jurisdiction to proceed *in rem*." Several States have met the requirements of this decision, notably, Oregon, whose statute (Comp. Laws 1887, § 3690), gives a lien "on every boat or vessel used in navigating the waters of that State, for damages or injuries to persons or property by such boat or vessel."[30] A similar Washington statute has also been uniformly upheld.[31] The statute of Virginia gives the right to sue *in rem*, and the character of the remedy prescribed has been held to involve a lien enforcible in admiralty.[32]

There is a third form of procedure in admiralty in which the liabilities of such parties as would have been defendants at common law are determined by the court and upon proofs entitling them to the benefits of the statute,[33] limited to the value of the wreck and freight, the jurisdiction of the maritime court, when invoked in this class of cases, surperseding that of the common-law courts, both State and federal. Claims for damages given by a State statute to the administrators or relatives of a person killed in a marine casualty are among the claims the liability for which is limited by the statute,[34] notwithstanding the fact that the injury sued for happened within the technical limits of a county of a State.[35] Such application of the statute has been resisted both by those who would have been plaintiffs in an action at law and by those who in such actions would have been made defendants. Their various contentions adverse to the jurisdiction of admiralty to adjudicate such claims and enforce recovery thereunder in this form of proceeding to the exclusion of the common-law jurisdictions, have all been resolved in favor of the admiralty.[36] Valid claims may be asserted under the limited liability act for

[29] 13 Wall. 237.

[30] Steamship Oregon, 73 Fed. Rep. 846, 42 Fed. Rep. 78, 45 Fed. Rep. 73.

[31] The Willamette, 59 Fed. Rep. 797, affirmed C. C. A., 70 *Id.* 874, 31 L. R. A. 715.

[32] Code, § 2902; The Glendale, 77 Fed. Rep. 906, affirmed 81 *Id.* 633.

[33] U. S. Stats., §§ 4282, 4285.

[34] *In re* Long Island Transp. Co., 5 Fed. Rep. 599, 624. Held, in a petition to limit liability in case of claims based on many deaths growing out of marine disaster, that the act was not intended to apply to vessels engaged in purely local traffic. The Mamie, 5 Fed. Rep. 820; Cuddy v. Horn, 46 Mich. 596, 21 Am. L. Reg. (N. S.) 302.

[35] Butler v. Boston & S. S. S. Co., 9 Sup. Ct. Rep. 612, 130 U. S. 527, 32 L. Ed. 1024.

[36] Butler v. Boston & S. S. S. Co., 9 Sup. Ct. Rep. 612, 130 U. S. 527, 32 L. Ed. 1024. And see The Columbus, 22 Fed. Rep. 460; Christopherson v. Humboldt Lumber Manfrs. Assn., 60 Fed. Rep. 428, *Id.* 73 Fed. Rep. 239, 46 L. R. A. 264. And see Memphis & C. P. Co. v. Overmann, 93 Fed. Rep. 247; Jacobsen v. Dallas P. & A. Nav. Co., 93 Fed. Rep. 975; Oregon R. R. & Nav. Co. v. Balfour, 90 Fed. Rep. 295; The City of Norwalk, 55 Fed. Rep. 98; The Favorite, 12 Fed. Rep. 213; The Columbia, 73 Fed. Rep. 226. The effect of the decree limiting liability is the complete bar of the common-law action. Rounds v. Providence & S. S. S. Co., 14 R. I.—See annotation in 23 Am. Law Reg. (N. S.) 614. And to obtain the benefits of the statute relief must be sought in admiralty. It will not suffice to merely set up the statute by plea to the common-law action. Duffy v. Gleason (Ind.), 58 N. E. Rep. 729.

the recovery of damages on account of loss of life of passengers in a collision, although there may be no lien or privilege upon the vessel given therefor by the local law.[37] Thus, where the vessel owners insisted that the limited liability act was only intended to authorize the adjudication of those claims for whose enforcement a lien might be asserted on the vessel, and was, therefore, inoperative to authorize an award of damages in cases of death by wrongful act, because neither the State statute granting the right of action nor any act of congress granted a lien in aid of the enforcement of such claims, the court held that by petitioning for an adjudication of their liability and limiting the same if found, and by suing out process restraining and enjoining claimants from suing elsewhere, the vessel owners were estopped from denying the right of those who would have been plaintiffs in the common-law court to come in and share in the fund realized from the sale of the offending vessel in the event that the proofs showed actionable negligence. "He may not restrain and enjoin them from suing in the State courts, compel them to join in the proceedings of which this court has properly jurisdiction, and then deny that they may proceed here."[38]

And where the parties plaintiff in a common-law action, having been enjoined from proceeding therewith, pending the determination of the limited liability cause, contended that they were entitled to litigate the liability of the vessel owner in the common-law action, on the ground of participation by the owners themselves in the particular faults and omissions relied on as constituting the grounds of recovery, the court said that allegations of that nature, forming as they do, one of the principal issues to be tried in the limited liability cause, could not be allowed to affect the jurisdiction of the maritime court and thus defeat the beneficent object of the law in enabling the owner to bring all parties into concourse who have claims arising out of the disaster or loss, and thus prevent a multiplicity of suits, and to adjust the liability to the value of the ship and freight.[39]

[37] The Albert Dumois, 177 U. S. 240, 20 Sup. Ct. Rep. 595.

[38] Jones v. St. Nicholas, 49 Fed. Rep. 671.

[39] Butler v. Boston & S. S. S. Co., 9 Sup. Ct. Rep. 612, 130 U. S. 527, 32 L. Ed. 1024.

It was further objected that the claims and proceedings that are to cease are only those pending in the federal courts, but the court declined to thus restrict the act because this would in effect nullify it by destroying its intended operation, in every case in which the claimants had been diligent enough to commence their action in the State courts before the filing of the petition in the district courts.[40] But proceedings to limit liability under this act brought by vessel owners do not operate to suspend the action at law against joint tort-feasors with such owners, the prosecution of suits against whom was not restrained in such proceedings to limit liability.[41]

It seems to be generally conceded in the admiralty that inasmuch as maritime law denies, and congress has passed no statute granting, the right to an action to recover damages for the death of a person by negligence on the high seas, the State statutes cannot be enforced with respect to negligence occurring thereon beyond their territorial limits, although no satisfactory reason has been assigned for the application of a different rule in actions *ex delicto* to that recognized by the supreme court in Crapo v. Kelly,[42] in aid of creditors in the enforcement of collections of their claims, where it was held that a vessel on the Pacific ocean is to be regarded, so far as concerns the operation of State insolvency laws, as a portion of the territory of Massachusetts, wherein her owners resided, so as to render valid her transfer in an insolvents' court of that State. There are decisions both ways on this subject, but the careful inquiry in the recent cases whether the transaction forming the basis of the suit occurred within the territorial limits of the State whose laws are invoked, indicates very conclusively that the admiralty would now deny the application of the death liability statute to casualties occurring on the high seas, on the ground that to extend them to that locality would be giving extraterritorial force thereto. McDonald v. Mallory[43] stands alone in the State courts as asserting

[40] *In re* Long Island Transp. Co., 5 Fed. Rep. 599, 624.

[41] Grundel v. Union Pacific Iron Works (Cal.), 59 Pac. Rep. 826, 47 L. R. A. 467.

[42] 16 Wall. 610.

[43] 77 N. Y. 546, 33 Am. Rep. 664.

such jurisdiction, and the precise question presented in that case has never been reviewed in the supreme court. The case of The E. B. Ward,[44] wherein the State statute was applied in admiralty to a death occurring on the high seas, is in conflict with that of Armstrong v. Beadle,[45] which holds that death resulting through negligence on the high seas is not within the statutes, while as noted above all the inferences to be drawn from the decisions of the admiralty in which the question has been noticed are against the validity of the claim. Thus the statute of California was held applicable in the case of Humboldt Lumber Manfrs. Assn. v. Christopherson,[46] because the proofs showed that the casualty occurred within the zone or belt of three miles from the shore of the ocean,[47] to which extent the California State and county boundaries had been extended by the provisions of the State constitution and the political code, the assertion of territorial jurisdiction over the waters of the ocean within those limits being recognized as a valid exercise of State rights. In Middleton v. La Compagnie Generale Transatlantique,[48] the application of the New Jersey statute was disputed on like grounds, but it appeared that that State, together with New York and the United States, being the only three political powers which could by any possibility be held entitled to exercise jurisdiction over the waters on which the accident had occurred, had by express and positive conjoint action settled the distribution of ownership and jurisdiction over those waters in favor of New Jersey, and laws of that State were therefore held to rule the case.[49] But in a case of collision and death upon Lake Michigan, within the geographical boundary line of the State of Wisconsin, but over three miles from mainland, the court refused to apply the principle restricting the operation of the death liability statute of that State to such zone or belt of three miles from the shore, on the ground that that lake was neither a boundary between nations nor an open sea, in the sense of being a free highway to adjoining nations or peoples, but was exclusively dominated by the United States.[50]

The consideration of cases of negligently inflicted death in foreign waters and on the high seas in foreign vessels more appropriately belongs to a discussion of judicial comity. Nevertheless, it is believed that the value of this paper to the profession will be enhanced by a brief notice of the few reported cases wherein deaths occurring in such localities were sued for in American admiralty courts. We have seen in the authorities cited in notes 18 and 19 that the State courts have several times entertained common-law actions founded on the statutes of foreign governments for the recovery of damages for deaths occurring on the high seas on board foreign vessels and in foreign waters, and to a limited extent the same rule of comity prevails in the admiralty. The rule in admiralty, however, does not permit the extension of the foreign statutes to casualties occurring outside the geographical limits of the country whose laws are invoked, although as to death by negligence within such limits the right of recovery is as freely admitted when the foreign law is duly alleged and proved as a like right arising under the laws of one of our own States would be.[51] It follows that for death occurring on the high seas in consequence of negligence of the officers and seamen commanding and controlling the navigating of a foreign ship, no recovery may be had in an American admiralty court under the law of the country to which the ship belonged, even though that law in terms applies to the case, but such cases must be adjudged and governed by the general admiralty and maritime laws as understood and administered in the United States.[52] Inasmuch as the admiralty would

[44] 17 Fed. Rep. 458.

[45] 5 Sawy. 484. See note to The Garland, 20 Am. Law Reg. (N. S.) 746, 747.

[46] 60 Fed. Rep. 428, *Id.* 73 Fed. Rep. 239, 46 L. R. A. 264.

[47] Humboldt Lumber Manfrs. Assn. v. Christopherson, 60 Fed. Rep. 428, affirmed, 46 L. R. A. 264, 73 Fed. Rep. 239. (Damages awarded on lives of captain and cook, $7,000 and $5,000.)

[48] 100 Fed. Rep. 866.

[49] 100 Fed. Rep. 866. (Damages awarded, $12,500.)

[50] Bigelow v. Nickerson, 70 Fed. Rep. 113. (Damages awarded, $4,000.) And a like jurisdiction over the waters of that lake within the boundaries of Illinois was asserted in *Re* The Norway, 52 Ill. 373.

[51] Robinson v. Detroit, etc. Nav. Co., 73 Fed. Rep. 883, 43 U. S. App. 190, enforcing right of action accruing under Ontario statute. And see Boyd, Admr., v. Clark, 8 Fed. Rep. 849.

[52] Rundell v. La Compagnie Generale Transatlantique, 100 Fed. Rep. 655, 32 Chicago Legal News, 270, 94 Fed. Rep. 366. The rule is the same with re-

deny the right of action in the case of a loss of life in a casualty occurring to an American vessel on the high seas, it would be an anomaly in our maritime jurisprudence, were effect given to the foreign law by permitting the assertion of a right of action based thereon for loss of life in a casualty occurring to a foreign vessel on the high sea. Nevertheless, the grounds upon which the extension of comity was urged in the Rundell case just cited would seem to have justified the court in disregarding the anomaly. The libelant was an American citizen. He sued as administrator for the death of an American citizen on the high seas occurring in consequence of the negligence and fault of the commander of a French vessel upon which his decedent was a passenger. The liability of the defendent corporation resulting from such negligence and fault of their employee had been judicially determined in the courts of France, in a action by the widow of another passenger who lost his life in the same disaster.[53] The laws of France undoubtedly authorized a recovery. It is not easy, therefore, to perceive wherein the enforcement of the right accruing under the laws of France in an American court would have conflicted with the policy of our laws, would have contravened good morals, or prejudiced the rights and interests of any of our own citizens.

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spect to personal injuries. Petersen v. Steamship Lamington, 19 N. Y. Law Journal, 919, 87 Fed. Rep. 752.

[53] Ressal v. La Compagnie, etc., 32 Chicago Legal News, 17.

RAILROAD COMPANY — INJURIES TO TRESPASSERS.

ENRIGHT v. PITTSBURG JUNCTION R. CO.

Supreme Court of Pennsylvania, January 7, 1901.

Where a child of tender years is riding on a freight train as a trespasser, it is the duty of the company and its employees not to endanger his life or limb by causing him to alight from the train when it is moving rapidly.

MESTREZAT, J.: Joseph Enright, a boy of 10 years, in company with two other boys, boarded a freight train on defendant's road while it was standing at the foot of Fortieth street, in the city of Pittsburg, on the afternoon of the 5th day of September, 1897. They got on a Pittsburg & Western iron flat car located about the middle of the train. A Baltimore & Ohio engine pulled the train, and an engine of the defendant company pushed it. A brakeman saw the boys get on the train, but at that time did not offer to put them off. The destination of the boys was Schenley Park, to see the goat races. After the train had stopped at the foot of Fortieth street long enough to attach the pushing engine, it started south in the direction of Schenley Park. When it emerged from the tunnel at or near the park, Joseph's companions jumped off. The train then was going pretty fast, and for that reason the boy did not wish or intend to attempt to get off. At that time the brakeman who was on the train, and two cars from Joseph, waved a stick, and hallooed at him, "Here comes the detective!" The boy, being frightened by the conduct of the brakeman, left the car on which he was riding, and got on the bumper between it and the car next in front of it. After he did so, the brakeman again waived his stick at him, and hallooed, "Here comes a detective?" The boy, then, through fear, attempted to get off the train while it was moving rapidly, and, falling under the wheels of the car on which he had been riding, was seriously injured. His right leg was taken off and his left leg was badly lacerated. Such, briefly stated, are the facts of the case as disclosed by the testimony. The learned judge of the court below granted a compulsory nonsuit, and subsequently refused to take it off, for the reason, as stated in his opinion, that "this case is ruled by the case of Cauley v. Railway Co., 98 Pa. St. 498." We must, therefore, assume that the court below held that the action of the brakeman resulting in the injury of Joseph Enright was not negligence for which the defendant company was liable.

The liability of the defendant in this action depends upon the question whether it owed a duty of ordinary care and prudence to the plaintiff's son under the circumstances of the case, and whether it exercised such duty. If no obligation of that character rested upon the defendant, then it is exonerated from any liability for the action of its employee in causing the boy to place himself in a perilous position, which resulted in his injury. The testimony, which we must assume to be true, establishes the fact that the boy was frightened by the brakeman, so that he attempted to get off the train before he otherwise would have done so. The defendant's employee, therefore, while in the line of his duty, caused the boy to make an attempt to leave the train while it was moving rapidly. This act occasioned the injury to the plaintiff's son. Was it negligence? The solution of this question will determine the correctness of the judgment of the court below. If the position assumed by the court and urged by the appellee's counsel be correct, then a railroad company owes no duty whatever to a person of any age who enters upon one of its trains as a trespasser. The company, under such circumstances, may with impunity at

any time eject a person from a train at the peril of life and limb. Its employees may throw the trespasser from the train, though death necessarily results from their action. The child of tender years, whose discretion cannot protect him,—as in this case,—who has entered its train with the knowledge and without objection of the brakeman, may be cast from the train with impunity while its rapid speed insures the greatest danger. Such is the logical conclusion from the rulings of the court below. We cannot assent to a doctrine fraught with so much danger to the public, and with so little regard for the rights of the individual. As said by Mr. Justice Gordon in Biddle v. Railway Co., 112 Pa. St. 551, 4 Atl. Rep. 485, "it would socially accord with Christian civilization as to render its maintenance impossible." It cannot be supported by reason. It ignores a duty owed by a man to his fellow-men in civilized society. It repudiates an obligation resting alike upon the individual and the corporation. The plaintiff's son was a trespasser upon the defendant's train. He had no right to be there, and the brakeman would have been justified in expelling him. The defendant owed no duty to carry him in safety to his destination, or to surround him with safeguards to protect him from falling from the train while in motion. He was not a passenger, nor entitled to protection as such. The defendant was not required to stop the train to permit him to alight, nor to run the train at any particular speed to suit the boy's convenience, or for his safety. No duties of this character devolved upon it. But, conceding this to be true, it does not follow that the defendant, by its employees, could eject the boy from the train, or cause him, by fright or fear, to leave the train while in rapid motion, so as to endanger his life. The child being on the train, and it running at a rapid speed, it became the duty of the defendant and its employees not to eject him. This duty arose from the circumstances. The failure to observe it was "a want of ordinary care under the circumstances," which is negligence. The brakeman knew the train was in motion, and hence saw the danger which must result from his conduct if the boy attempted to leave the train. His act was done, therefore, with full knowledge of the peril in which it placed the child. Consequently, the defendant, through its employee, disregarded a plain duty, which resulted in the painful and serious injury of the plaintiff's son.

The simple proposition to be determined here is the right of the defendant, by its employee, to endanger the life of a child of tender years by compelling him to alight from a freight train while it is moving at a rapid speed. The boy was not injured by reason of the dangerous position in which he placed himself, but because of the careless and reckless act of the brakeman in causing him to alight while the train was in motion. The cause of the boy's injury, therefore, is directly attributable to the negligent act of the defendant's employee in frightening him so that he attempted to quit the train in the face of imminent danger. We think the defendant company was negligent, and should answer for its conduct. This position is sustained by many decisions of this court. In Biddle v. Railway Co., *supra*, Mr. Justice Gordon, delivering the opinion, says: "That the defendant's driver or conductor was grossly negligent in compelling a child of twelve years of age to jump—and that backwards—from the platform of a moving car, no one can well deny. It was a mistake to hold that, because the child was a trespasser, it could, therefore, be ejected in a manner which endangered its life or limb. In the case of Pennsylvania Co. v. Toomey, 91 Pa. St. 256, we held, per Mr. Justice Mercur, that such a disposition of a trespassing adult could not be allowed; and that ordinary care must be used to avoid injury even to a trespasser is fully established by the cases of Railroad Co. v. Lewis, 97 Pa. St. 33, Hydraulic Works Co. v. Orr, 83 Pa. St. 332, and Railroad Co. v. Hummell, 44 Pa. St. 375." In Arnold v. Railroad Co., 115 Pa. St. 140, 8 Atl. Rep. 213, it is said: "But the second rule to which we have adverted is that even a trespasser cannot be ejected from a train without a reasonable regard for his safety. This rule, as stated by Mr. Justice Hunt in the case of Railroad Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745, is as follows: "Whilst a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to a passenger, it is nevertheless not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts. And this same doctrine has been approved by our own authorities (citing them). If, then, we assume that the plaintiff was a trespasser, still the defendant had a duty to perform with reference to his safety which it was not at liberty to neglect; hence the court erred in directing a nonsuit." In Barre v. Railway Co., 155 Pa. St. 173, 26 Atl. Rep. 99, the court says: "Assuming as a fact the defendant's allegation that plaintiff was a trespasser, that would not justify the driver in removing her from the rapidly moving car so forcibly and with such utter disregard for her personal safety. If the testimony was believed—as it must have been—by the jury, the driver was fully aware of the plaintiff's situation, and how she was sustaining herself, and he could not have been ignorant of the fact that she was a child of tender years. Knowing all this, he was at least bound to exercise such care in putting her off as not to endanger her life or limbs. Even trespassers are entitled to humane consideration; but plaintiff's youth exempted her from the charge of being a trespasser, in the legal signification of the word."

The learned counsel for the appellee contends that the facts of this case bring it within the decisions of the court in Flower v. Railroad Co., 69 Pa. St. 210, Railroad Co. v. Schwindling, 101 Pa.

St. 258, and Cauley v. Railway Co., 95 Pa. St. 398. It is, therefore, necessary to briefly refer to these cases, and see what they decide. In Flower v. Railroad Co., a boy, who was standing on the platform of a water tank, was requested by the fireman, who was acting as temporary engineer, to put in the hose, and turn the water on the engine tank. He climbed up the side of the tender to put in the hose, and as he did so some detached freight cars belonging to the train ran down without any brakeman, and struck the car behind the tender, driving the tender and engine forward. The boy fell from the tender, and was killed. In the opinion of the court, by Mr. Justice Agnew, it is said that the case turned "wholly on the effect of the request of the fireman, who was temporarily engineer, to put in the hose and turn on the water." It was, therefore, held that, it not being in the scope of the engineer's or fireman's employment to ask any one to come on the engine, the defendant was not liable. In Railroad Co. v. Schwindling a boy of 5 or 6 years went upon the platform of a railroad station for his own amusement, and, while standing on the edge of the platform, looking at an approaching train, was struck and injured by an iron step which was bent and projected a few inches from the car of a passing train. The boy was told to step back from the position he occupied on the platform, but he refused to do so. Upon the authority of Gillis v. Railroad Co., 59 Pa. St. 141, it was held that under these facts there could be no recovery, and that "the controlling feature of the injury in all such cases is, was there a duty to the plaintiff which was violated by the defendant? If there was not, there was no legal liability." We think it apparent that the two cases just referred to do not sustain the contention of the appellee. The facts clearly distinguish them from the one at bar. It must be conceded that Cauley v. Railway Co., *supra*, supports the position of the appellee. It was before the court twice, and is reported in 95 Pa. St. 398, and 98 Pa. St. 498. Both opinions were written by the same justice, and from both judgments two justices dissented. The opinion in the first report of the case is broader, and goes much further, than the syllabus, in which there is nothing that conflicts with the views expressed in this opinion. The second opinion reiterates the views enunciated in the first opinion. We have examined carefully the decisions of this court cited in both opinions, and are convinced that they do not sustain the conclusion of the court on the facts disclosed in the Cauley case. We do not think the doctrine announced in the opinions filed in that case is supported by reason or authority, and, in so far as it conflicts with the views herein expressed, the case is overruled. It follows that the learned judge of the court below was in error in withdrawing the case from the jury, and hence the assignments of error must be sustained. The judgment is reversed, and a *procedendo* awarded.

NOTE.—*Recent Cases on the Duty, Rights and Liabilities of Railroad Companies as Regards Trespassers and Licensees on their Tracks and Property.*—A child twelve years of age, and lacking in intelligence who gets on a moving train at a street crossing, and is injured, may recover against the company, where its servants know, or might have known, that it was in a position of danger, and fail to exercise ordinary care to prevent injury to him. Thompson v. Missouri, K. & T. Ry. Co. of Texas (Tex. Civ. App.), 32 S. W. Rep. 191. A railroad company is liable for injuries to a boy by his being thrown from a hand car by negligence of its employees in operating it while riding thereon by invitation of such employees, though the invitation was given, and the boy was riding thereon in violation of its rules. Missouri, K. & T. Ry. Co. of Texas v. Rodgers (Tex. Civ. App.), 35 S. W. Rep. 412. Defendant's freight conductor had been in the habit of allowing plaintiff, with other small boys, to help unload freight, and of giving them a free ride to a water tank some distance from the depot; but, on the day the injury was received, plaintiff did not help unload, and was not asked to help or promised a free ride, but got on the train with the other boys, and road to the tank, and got off the train safely. After the train had started again, plaintiff caught hold of a ladder handle, and, in afterwards jumping from the train, landed on a pile of coal, part of which slipped under his feet, and threw him under the wheels. The conductor did not know that plaintiff was on the train until after it started from the depot, and did not see him get on again after the train left the tank. Held, that defendant was not liable. Louisville & N. R. Co. v. Webb (Ky.), 35 S. W. Rep. 1117. A yardman in the employ of a railroad, whose duty it was to deliver freight cars from his own company to defendant company, and to receive cars from defendant company to his own, and who at the most had only an invitation from defendant to visit its yard from time to time to see if there were cars for plaintiff's road, cannot recover of defendant for injuries received from getting on the side of defendant's train, without invitation, and without the knowledge of any of the crew, for the purpose of going to defendant's yard; plaintiff being a trespasser. Grunst v. Chicago & W. M. Ry. Co. (Mich.), 67 N. W. Rep. 335. In an action against a railroad company for injuries to a trespasser, caused by his being compelled by a brakeman to jump from the train while moving, a charge that "defendant had the right to order him off such train, or to eject him therefrom, or to do both, but in doing so it was the duty of defendant to use reasonable and ordinary care, under the circumstances of the case, so as to not injure him," did not require too high a degree of care. Houston & T. Cent. R. Co. v. Grigsby (Tex. Civ. App. 35 S. W. Rep. 815. Where a freight car was set on a side track by a railroad company to be loaded for a shipper, and was under the control of the local agent, an employee of the shipper, sent by him into the car after it was loaded, to count and check the contents, with the knowledge of the agent, is not a trespasser, and the railroad company is liable for his injury through the negligent acts of its servants, and when he was in the exercise of proper care. Missouri, K. & T. Ry. Co. v. Holman (Tex. Civ. App.), 39 S. W. Rep. 130. A trespasser who, without authority or license from the railroad company, was riding upon the step in front of a freight engine, and was injured in a collision, his presence there not being known to the trainmen, cannot recover for the in-

jury. Baltimore & O. S. W. R. Co. v. Railroad Co. (Super. Ct. Cin.), 3 Ohio N. P. 310. A trespasser, who was injured while trying to climb upon a car in a slowly-moving freight train, which he was prevented from doing by a brakeman, cannot recover damages from the railroad company, unless the injury was caused by the use of unnecessary force by the brakeman. Louisville & N. R. Co. v. Bernard (Ky.), 37 S. W. Rep. 841. Where a brakeman, acting within the scope of his authority, negligently ordered a trespasser to alight from a moving train, and the trespasser was injured, while obeying the order, the company is liable, though no actual force was used. Farber v. Missouri Pac. Ry. Co. (Mo. Sup.), 40 S. W. Rep. 932. While expulsion of trespassers by a brakeman is not a duty incident to his employment, if it is the custom of brakeman to eject trespassers, and the company knows, or ought to know, of it, authority may be inferred. Chesapeake & O. R. Co. v. Anderson, 93 Va. 650, 25 S. E. Rep. 947. A trespasser on a train must be given a reasonable opportunity to alight without danger, and may recover for injuries received through being forced to leave the train, while it is in motion, by employees acting within the scope of their employment. Chesapeake & O. R. Co. v. Anderson, 93 Va. 650, 25 S. E. Rep. 947. A railroad company, in construction of its roadbed, is not bound to use care to prevent injury to persons who may thereafter be licensees on its right of way. Houston & T. C. R. Co. v. Scalinski (Tex. Civ. App.), 46 S. W. Rep. 113. A railroad company is not liable for injuries to persons trespassing upon its right of way, unless the acts resulting in such injuries are wantonly or willfully committed. Meehan v. Chicago & N. W. Ry. Co., 67 Ill. App. 39. A railroad company is not negligent in failing to erect a fence to keep trespassers off its switch yard, especially where a watchman is employed. Jackson's Admr. v. Louisville & N. R. Co. (Ky.), 46 S. W. Rep. 5. A boy of 17 1 2 years, who, out of curiosity, goes upon the premises of a railroad company to witness the accidental burning of a train of tank cars, filled with petroleum, assumes the risks of the situation; and, though he voluntarily renders some services in preventing the spread of the fire to other property, he cannot recover against the company for injuries caused by an explosion of one of the cars. Cleveland, C., C. & St. L. Ry. Co. v. Ballentine, 84 Fed. Rep. 935, 28 C. C. A. 572. It is not a duty of a railroad company to see that children do not climb upon its trains at street crossings, and no negligence can be charged against it for failing to do so. Haberlau v. Lake Shore & M. S. R. Co., 73 Ill. App. 261. A railroad company is not liable for an injury to a boy seven years of age, who fell in front of a moving train in a switch yard, where he had no right to be, defendant's servants having done all they could to avoid the injury after the boy's peril was discovered. Jackson's Admr. v. Louisville & N. R. Co. (Ky.), 46 S. W. Rep. 5. The company owed the boy no duty by reason of the fact that some one of its servants had three weeks before the accident invited the boy to enter the switch yard. Jackson's Admr. v. Louisville & N. R. Co. (Ky.), 46 S. W. Rep. 5. A turntable was located upon the company's private property, near to a public street, and was entirely unprotected and unguarded. Children of all ages frequently congregated upon the premises to play upon the turntable. Held, that the company was not liable for an injury resulting to a young child while playing on such turntable. Delaware, L. & W. R. Co. v. Reich (N. J.), 46 Atl. Rep. 682. A railroad company which maintains a turntable upon its own land is not liable for an injury to a child who comes upon the land and receives the injury by playing with the turntable, without any invitation express or implied. Turess v. New York, S. & W. R. Co. (N. J. Sup.), 46 Atl. Rep. 614. An invitation to a child to come upon the company's land and play on its turntable will not be implied from the fact that the turntable, obviously designed for another purpose, furnishes a place for play, which is attractive to children. Turess v. New York, S. & W. R. Co. (N. J. Sup.), 40 Atl. Rep. 614. To render a railroad company liable for injury to a child *non sui juris*, received while playing on its turntable, left unguarded and unlocked, which, as known by the company's agents and servants, was, when unlocked, a dangerous appliance to children, and frequently visited and put in motion by them, it is not necessary that the child have had permission to go on the turntable. San Antonio & A. P. Ry. Co. v. Morgan (Tex. Civ. App.), 45 S. W. Rep. 169. A railroad company is liable for the death of a trespasser on its trains where its servants could have "lessened" the speed of the train on discovering the danger of deceased so as to have avoided the accident, or so decreased the force of the blow that death would not have resulted; and an instruction that the company was liable only if the danger was discovered by those in charge of the train in time to "stop" it before reaching the place where deceased was killed was erroneous. De Lalacios v. Rio Grande & E. P. Ry. Co. (Tex. Civ. App.), 45 S. W. Rep. 612. After the presence of a person stealing a ride on a train is discovered, the railroad company owes him the duty which humanity imposes, and his efforts to cling to the train to prevent falling under the wheels cannot be considered as a resistance to those attempting to remove him while the train is in motion. Southern Ry. Co. v. Shaw, 86 Fed. Rep. 865. Where a person stealing a ride on a train continues to get off after being put off, it does not entitle the railroad company to use increased force, especially where the trespasser is a child ten years old. Southern Ry. Co. v. Shaw, 86 Fed. Rep. 865. The forcible expulsion from a freight train running 25 miles an hour, by a brakeman, of a trespasser, resulting in an injury to the latter, gives him a right of action against the company. Savannah, F. & W. Ry. Co. v. Godkin (Ga.), 30 S. E. Rep. 378. The failure of employees of a railroad operating an engine to exercise reasonable diligence to avoid an injury to one perceived to be in a position of peril, from which he is not likely to extricate himself, though he is a trespasser, will render the railroad company liable for an injury which results. Anderson v. Hopkins (U. S. C. C., A.), 91 Fep. Rep. 77. The fact that a railroad was not fenced at a place where a trespasser attempted to catch a ride, and was injured, does not make the company liable. Mugford v. Boston & M. R. R. (Mass.), 52 N. E. Rep. 1078. While a boy was standing on the footboard of a switch engine attached to a moving train, the engineer threw steam and hot water on him, to make him get off. The boy, because of the fright and the pain, attempted to jump to the next car, which was a flat car, and was injured. Held, that the engineer was guilty of a willful assault, and the company was liable, though the boy was a trespasser, and was himself guilty of a want of care in jumping. Galveston, H. & S. A. Ry. Co. v. Zantzinger (Tex. Civ. App.), 49 S. W. Rep. 677. Where a brakeman pulled a boy who was stealing a ride off the rods under a car while

the train was in motion, and threw a stone at him, which caused him to fall under the car, the brakeman was acting within the scope of his authority, so as to render the railroad company liable for the resulting injury, though he acted in disobedience to the rules of the company. Illinois Cent. R. Co. v. King, 77 Ill. App. 581. A railroad company is not liable for injuries caused by the expulsion of a trespasser by a brakeman having no authority to expel trespasser. Chicago, R. I. & P. Ry. Co. v. Brackman, 78 Ill. App. 141. A freight train brakeman has no implied authority to expel trespassers from the train, where no such express authority has been given him, and there is a conductor in charge of the train, who has such express authority. Chicago, R. I. & P. Ry. Co. v. Brackman, 78 Ill. App. 141. Where an employee of a railroad company, acting within the scope of his employment, compels a trespasser to get off a moving train, and, because of being compelled to so get off, the trespasser is killed, the railroad company is liable, though the employee's act was wanton and malicious. Pierce v. North Carolina R. Co. (N. Car.), 32 S. E. Rep. 389. The engineer of a switch engine has authority to eject a passenger standing on the footboard of the engine, though such footboard is intended for the use of switchmen, who, together with the engineer, are under the direction of the foreman of the switching crew. Galveston, H. & S. A. Ry. Co. v. Zantzinger (Tex. Civ. App.), 40 S. W. Rep. 677. In an action for personal injuries, it appeared that defendant railroad permitted the public to use a path crossing its premises. Plaintiff, while walking on the path at night, became confused by a car standing on the track across the path, and, on attempting to go around the car, fell into a pit maintained by defendant under its tracks, which was not concealed, except by the darkness. Held, that defendant was not entitled to recover, since he was a mere licensee, and defendant owed him no duty except not to injure him willfully. Lingenfelter v. Baltimore & O. S. Ry. Co., 154 Ind. 40, 55 N. E. Rep. 1021. Where the evidence tended to show that a brakeman, immediately after frightening plaintiff, a trespasser, from the train, pushed him against the moving car so that his feet were crushed under the wheels, it was error to instruct the jury that there could be no recovery unless plaintiff was still holding to the car when the brakeman seized him; the whole being a continuous transaction, and the removal of trespassers from the train being within the apparent scope of the brakeman's duty. Elliott v. Louisville & N. R. Co. (Ky.), 52 S. W. Rep. 833. There was evidence that the conductor, ordering plaintiff to leave the car, almost immediately ejected, or attempted to eject him, slapped him in the face, and struck him so hard that finger prints were on his face a short time thereafter. Held, that the evidence was competent on the question whether the conductor ejected, or attempted to eject, plaintiff without giving him a sufficient opportunity to leave, or used more force than was necessary. Rowell v. Boston & M. R. Co., 68 N. H. 358, 44 Atl. Rep. 488. In an action against a railroad company for injuries alleged to have been caused by defendant's conductor in removing plaintiff from a moving freight train on which he was trespassing an instruction that if, when plaintiff was about to alight therefrom, the conductor pushed him, so that he was thrown to the ground and injured, he could recover, was proper, when based on the version of the transaction, as shown by plaintiff's testimony. Barrett v. New York Cent. & H. R. R. Co., 61 N. Y. S. 9, 45 App. Div. 225. Where the plaintiff was merely trespassing on defendant's train, with no criminal intent, his presence there does not forfeit him his legal rights, and while defendant's servants may move him, using necessary force to do so, the law still shields him from violent, unnecessary, and malicious assault at their hands, and he is entitled to recover if he is thus injured in their endeavor to remove him. Cincinnati, H. & D. R. Co. v. Boyer, 78 Ohio Cir. Ct. Rep. 327, 10 O. C. D. 199. Where one in charge of an engine had absolute possession of the machinery, the jury were authorized to find that he had authority to eject a trespasser from the footboard, thereby making the railroad liable for excessive force used in such ejection. Galveston, H. & S. A. Ry. Co. v. Zantzinger (Tex.), 35 S. W. Rep. 379, 47 L. R. A. 282. As between a railroad company and a trespasser on its right of way, no duty of care to avoid injury to such trespasser arises until those in charge of the train have discovered his presence on or dangerously near the track, and have reasonable cause to believe that injury will result unless the progress of the train is arrested. That he might have been seen before he was, or that the train was running at a dangerous or illegal rate of speed, is merely evidence of negligence, which in such case does not give a right of action for the injury. Cleveland, C., C. & St. L. Ry. Co. v. Tartt, 99 Fed. Rep. 389, 39 C. C. A. 568. A person is not *ipso facto* a trespasser in crossing railroad tracks laid through the streets of a city upon, or substantially upon, the level of the street, although he crosses at any point where it is convenient for him to do so, instead of going to a regular street crossing. Baltimore & P. R. Co. v. Cumberland, 176 U. S. 232, 20 Sup. Ct. Rep. 880. Where plaintiff, in an action for damages, is struck by defendant's train on a street crossing, but while he was in fact walking on defendant's right of way between the tracks, and at the time of the accident had reached the street, the plaintiff is not entitled to the benefit of the rule that a person exercising ordinary care in crossing a railroad track may recover for the negligence of the company; but is negligent as a trespasser on the right of way, and cannot recover unless the act of the company causing the injury is willful, intentional, wanton, or reckless. Robards v. Wabash Ry. Co., 84 Ill. App. 477. Where a railroad company posts a sign warning and forbidding, as trespassers, all persons except employees from going upon its tracks, an employee passing along the track while off duty is not a trespasser within the meaning of such warning. International & G. N. R. Co. v. Brooks (Tex. Civ. App.), 54 S. W. Rep. 1056.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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or notice of dishonor was alleged or proved, the holder could not recover from the indorser on a mere showing that he had received indemnity from the maker, since such showing was no legal excuse for failure to allege and prove demand and notice.—MOODY v. KELLER, Ala., 29 South. Rep. 68.

16. BILLS AND NOTES—Parol Evidence of Suretyship.—Where several parties signed a note as makers, but in fact, and to the payee's knowledge, were mere sureties for the debt of another, parol evidence of suretyship should not be excluded as tending to vary the terms of a negotiable note, even though the principal debtor's name did not appear on the note, since it is always competent to show that any obligation, whatever its form, was made in fact for the debt of another.—HOFFMAN v. HABIGHORST, Oreg., 63 Pac. Rep. 810.

17. BILLS AND NOTES—Pleading.—In an action on a note given for the price of land, and "payable at the time the tax title or deed can be procured," a petition setting out the note, and alleging that it was due, did not state a cause of action, without an allegation that the condition had been met.—ARY v. CHESMORE, Iowa, 84 N. W. Rep. 965.

18. BILLS AND NOTES—Principal and Surety.—There was evidence that of two makers of a note A received the consideration, and gave a part of it to the other, B, taking his note therefor. Held, in an action on the original note, that a charge that, if B "received any part of the consideration," he was not a surety only, was not misleading in forcing the jury to find B was not a surety, though they found that he borrowed part of the money from A, since such money borrowed was not a "part of the consideration," but was the consideration of his own note to A.—PARMENTER v. BASS, Iowa, 84 N. W. Rep. 965.

19. BILLS AND NOTES—Sales.—A bank purchasing a draft from the consignor of merchandise with bill of lading attached, after collecting the full amount of the draft, is not liable to the purchaser of the goods for a breach of warranty made by the consignor; for, after the holder of a negotiable draft has secured payment from the drawee, he is unaffected by any equities originally existing between the drawer and drawee.—TOLERTON & STETSON CO. v. ANGLO-CALIFORNIA BANK, Iowa, 84 N. W. Rep. 930.

20. BROKERS—Right to Commissions.—A broker has no right to commissions for making a sale, though he first calls the attention of the purchaser to the property, the latter then refusing to make the purchase, but being induced, two years later, to make it, by one acting as agent of or purchaser from the one represented by the broker. — KIEFER v. YODER, Pa., 47 Atl. Rep. 974.

21. CARRIERS—Passenger — Negligence.—A railroad company is liable to a passenger for an injury caused by a violent jerking of the train in starting before he has time to be seated.—SHEFFER v. LOUISVILLE, H. & ST. L. RY. CO., Ky., 60 S. W. Rep. 408.

22. CARRIERS—Passenger—Degree of Care—Instructions.—In an action for injuries, an instruction that it was the duty of a railroad company in the management of its trains to exercise the highest degree of care for the safety of its passengers was proper.—HOUSTON & T. C. R. CO. v. GEORGE, Tex., 60 S. W. Rep. 813.

23. CHATTEL MORTGAGE — Consent to Sale of Mortgaged Chattels.—A mortgagee who consents to a sale being made of the mortgaged chattels by the mortgagor waives the lien of the mortgage as to such portions of the mortgaged property as the mortgagor may sell under such consent, and the purchaser takes title free of the mortgage lien.—A. J. KNOLLIN & CO. v. JONES, Idaho, 63 Pac. Rep. 638.

24. CONTRACT — Attorney and Client. — A writing signed by an attorney, reciting the receipt by him of a certain note from defendant for collection on contingent fee, was binding on the attorney, though not signed by defendant.—LAVENSON v. WISE, Cal., 63 Pac. Rep. 622.

25. CONTRACT—Sales—Entirety of Contract—Renunciation.—A contract for the sale and purchase of 2,000 bicycles at specified prices, monthly shipments to be made as should be specified by the purchaser, is an entire contract; and the failure of the purchaser to pay for deliveries made, within the time stipulated, is not a renunciation of the contract which justifies the seller in treating it as abandoned, and absolves him from his obligation to make further deliveries thereunder, in the absence of a provision therefor in the contract, unless there is a refusal by the purchaser to pay, in such terms as to evince a purpose on his part to renounce the contract.—MONARCH CYCLE MFG. CO. v. ROYER WHEEL CO., U. S. C. C. of App., Sixth Circuit, 105 Fed. Rep. 824.

26. CONTRACTS — Subscriptions — False Representations.—Where persons signing a contract for the erection of a creamery and installation of machinery do not rely on representations made by the agent of the other party, but sent a representative to investigate the proposition, they cannot defeat their liability on the ground that the representations of the agent were false and fraudulent.—CHICAGO BLDG. & MFG. CO. v. HIGGIN-BOTHAM, Miss., 29 South. Rep. 119.

27. CORPORATIONS—Authority of Officers—Note.—In an action to recover upon the promissory note of a corporation, it is held, that the president and general manager of the corporation, who possessed and exercised, with the assent of the corporation, general and unrestricted charge and control of the management of its affairs, and who was the sole stockholder thereof, had implied authority to borrow money to pay and discharge maturing obligations and debts of the corporation, and to make and deliver, for that purpose, its promissory notes.—APRICA v. DULUTH NEWS-TRIBUNE CO., Minn., 84 N. W. Rep. 1019.

28. CORPORATIONS — Directors.—Directors, individually, cannot bind or affect the rights of a corporation. PEIRCE v. MORSE-OLIVER BLDG. CO., Me., 47 Atl. Rep. 914.

29. CORPORATION — Foreign Corporation—Carrying on Business.—Ky. St. § 571, declaring it to be unlawful for any corporation to carry on business in the State without having filed with the secretary of state a statement designating its office in this State, and its agent thereat, upon whom process may be served, is not a regulation of interstate commerce in its application to a press-dispatch company.—ASSOCIATED PRESS v. COMMONWEALTH, Ky., 60 S. W. Rep. 295.

30. CORPORATIONS — Insolvency — Unpaid Subscriptions—Limitations.—On the insolvency of a corporation, the creditors' right of action for unpaid subscriptions is complete, so that the statute then begins to run.—SWEARINGEN v. SEWICKLEY DAIRY CO., Pa., 47 Atl. Rep. 941.

31. CORPORATIONS—Names—Injunction.—A corporation assuming the name of an older corporation will be enjoined from using it, though there is no fraudulent intent; the natural and necessary consequence of such use being to injure the older corporation by confusing its identity. — AMERICAN CLAY MFG. CO. v. AMERICAN CLAY MFG. CO. OF NEW JERSEY, Pa., 47 Atl. Rep. 940.

32. CORPORATIONS — Stockholders—Stock Subscriptions.—An agreement between the stockholders of a corporation that the money and property received from them by the corporation shall discharge their liability on stock subscriptions is valid as between themselves.—EGGEN v. SMITH, Iowa, 84 N. W. Rep. 954.

33. CORPORATIONS—Stockholders' Suit—Directors.—Where no meeting of stockholders of a corporation is called, and a majority vote of its directors, or a written application by the holders of two-thirds of its stock, is necessary to call such a meeting, and the defendants in a stockholders' suit for a misappropriation

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1. ACCORD AND SATISFACTION — Acceptance From Surety of Less Than is Due.—A surety is not discharged by an agreement that a payment by him of less than is admitted to be due shall be in satisfaction of the debt, though there be a controversy as to the amount due.—HUFF v. LOGAN, Ky., 60 S. W. Rep. 483.

2. ACCORD AND SATISFACTION — Payment — Agent.—Where an agent receiving a bill for the purpose of collection only, his unauthorized acceptance of a less sum than that due thereon, in full settlement, will not prevent the owner from maintaining a suit for the balance, unless he ratifies the act of the agent.—SAUNDERS v. WHITCOMB, Mass., 59 N. E. Rep. 192.

3. ASSAULT—Damages—Evidence.—On the trial of a civil action for the recovery of damages for an alleged assault upon a woman pregnant with child, an alleged result being a miscarriage, it is not necessary, in order for the plaintiff to recover substantial damages for this particular injury, that she show by testimony that she suffered more pain, or increased illness, or greater impairment of health, than she would if the delivery of the child had been at the proper time and in the natural way.—PLONTY v. MURPHY, Minn., 84 N. W. Rep. 1005.

4. ASSAULT AND BATTERY—Evidence of Character.—In trespass for assault and battery, evidence that defendants are men of peaceable character is inadmissible.—MARKEY v. ANGELL, R. I., 47 Atl. Rep. 882.

5. ASSIGNEE FOR BENEFIT OF CREDITORS—Accounting.—Profits made in a business after its assignment for benefit of creditors belong to the estate, and not to the assignee, and he must account for them.—IN RE MANSFIELD, Iowa, 84 N. W. Rep. 967.

6. ATTACHMENT—Dissolution—Bankruptcy.—Bankr. Act, § 67c, provides that a lien created by an attachment begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by his adjudication as a bankrupt, and section 671 declares that all attachments obtained within four months prior to the filing of a petition in bankruptcy against an insolvent shall be deemed void if he is adjudged a bankrupt. Defendant's property was sold under an attachment on mesne process within four months of his discharge in bankruptcy, and the proceeds of the sale were deposited in court awaiting the determination of the attachment suit. Held, that defendant's adjudication in bankruptcy dissolved the attachment lien, and the proceeds should be paid to the assignee in bankruptcy.—SCHMILOVITZ v. BERNSTEIN, R. I., 47 Atl. Rep. 884.

7. BANKRUPTCY — Amount of Claim — Estoppel. — Where the fund to be distributed among the creditors of a bankrupt storage company consisted entirely of the proceeds of insurance on the property of such creditors burned while in storage, the amount of which was determined by an agreement between the insurers and the respective owners as to the value of the property of each, the creditors are bound by such valuations, as between themselves, and one cannot be permitted to prove a larger claim on the ground that his valuation was intended to cover only his interest in the goods after deducting the amount of a lien thereon in favor of the bankrupt.—IN RE RELIANCE STORAGE & WAREHOUSE CO., U. S. D. C., E. D. (Pa.), 105 Fed. Rep. 361.

8. BANKRUPTCY—Objections to Discharge—Permitting Amendment.—The bankruptcy act contemplates a speedy discharge of the bankrupt, and it is the duty of creditors who desire to object to advise themselves of the requirements of the statute, and bring themselves strictly within its terms. When they have long delayed a hearing on the application for discharge by reason of their insufficient objections, it rests largely within the sound discretion of the court whether or not amended specifications shall be permitted; and especially it will require that such amended specifications, to be allowed, shall conform strictly to the statutory requirements.—IN RE MUDD, U. S. D. C., W. D. (Mo.), 105 Fed. Rep. 348.

9. BANKS—Receiving Deposit When Insolvent.—A check deposited in a bank on the day it closed its doors, and when it was known by its officers to be insolvent, remains the property of the depositor, who may recover the proceeds from the receiver, where they are shown to have come into his possession.—RICHARDSON v. OLIVIER, U. S. C. C. of App., Fifth Circuit, 105 Fed. Rep. 277.

10. BANKRUPTCY—Right to Discharge — Fraud of Agent.—A fraudulent concealment of assets by the husband of a bankrupt, as manager of her business, without her privity or knowledge, does not constitute ground for refusing her a discharge, nor, it seems, does the husband's failure to keep proper books of account showing the true condition of her business.—IN RE MEYERS, U. S. D. C., S. D. (N. Y.), 105 Fed. Rep. 353.

11. BANKS AND BANKING—Ultra Vires — Increase of Shares.—Where a stockholder seeks to recover damages for the corporation's action in depriving him of his right to acquire his quota of newly issued shares proportionate to the amount already owned by him, he must first show that he has demanded the shares and offered to subscribe and pay for them in the regular manner.—BONNET v. FIRST NAT. BANK OF EAGLE PASS, Tex., 60 S. W. Rep. 325.

12. BILLS AND NOTES—Certificate of Deposit—Negotiability.—A certificate of deposit payable in current funds to the order of the depositor on return of the certificate properly indorsed, with interest at 3 per cent. per annum if on deposit six months, is negotiable.—HATCH v. FIRST NAT. BANK OF DEXTER, Mo., 47 Atl. Rep. 908.

13. BILLS AND NOTES—Compromise and Settlement.—Action on a promissory note, in which the defense was that the note was extinguished by the settlement and dismissal of a former action between the same parties. Held, that the trial court did not err in receiving oral evidence as to the settlement, nor in its instructions to the jury as to such settlement, and that the verdict to the effect that the note was so extinguished is sustained by the evidence.—SOUTHWICK v. HERRING, Minn., 84 N. W. Rep. 1013.

14. BILLS AND NOTES—Evidence of Payment.—Where a surety on a note contends in an action thereon that it was paid to an intermediate holder by the principal, the latter cannot be asked if he paid the note to such holder, since such question calls for a conclusion, but he should be interrogated as to the facts showing such payment.—HICKS v. WILLIAMS, Iowa, 84 N. W. Rep. 935.

15. BILLS AND NOTES — Indorser — Indorsement.—Where it was admitted that a note was indorsed for the accommodation of the maker, and not made for the accommodation of the indorser, and no demand

of corporation funds constitute a majority of its directors, and control over one-third of its stock, the suit may be maintained, though no redress is first sought before the board of directors or by a stockholders' meeting.—SCHOENING v. SCHWENK, Iowa, 84 N. W. Rep. 916.

34. CRIMINAL LAW—Assault with Intent to Murder.—An unlawful attempt to do harm by violence to the person of another, by a person having the ability to commit such an injury, is an assault, though no actual harm is done to the person.—STATE v. JONES, Dela., 47 Atl. Rep. 1006.

35. CRIMINAL LAW—Homicide—Self-Defense—Instructions to Jury.—Though deceased had threatened to kill accused, it was error to instruct the jury that they might acquit on the ground of self-defense if they believed that deceased had formed an intention to kill accused, and was then about to arm himself for the purpose of carrying into execution that intention, as the danger or apparent danger must be immediate, to justify the taking of life.—COMMONWEALTH v. RUDERT, Ky., 60 S. W. Rep. 489.

36. DEATH BY WRONGFUL ACT—Action for Damages—Idaho Statute.—Rev. St. Idaho 1887, § 4100, giving a right of action for wrongful death to the "heirs or personal representatives" of the deceased, having been copied from the statute of California after the latter had been given a construction by the supreme court of the State sufficiently liberal to include as a beneficiary a parent who has suffered an actual pecuniary loss by the death of a son caused by the wrongful or negligent act of another, the legislature of Idaho must be presumed to have adopted the known judicial interpretation of the act as well as the text.—PETERMAN v. NORTHERN PAC. RY. CO., U. S. C. C., D. (Wash.), 105 Fed. Rep. 835.

37. DEATH BY WRONGFUL ACT—Measure of Damages.—A jury can estimate the damages to a parent caused by the negligent killing of a son, as to contributions which he has a reasonable expectation of receiving from the son after his majority, on evidence of his health, strength, willingness, etc., without a statement of any definite sum by a witness.—SAN ANTONIO TRACTION CO. v. WHITE, Tex., 60 S. W. Rep. 323.

38. DEEDS—Notice—Destruction of Records—Estoppel to Dispute Vendor's Title.—Where a debtor purchased land, and procured his vendor to convey it to his wife, with intent to defraud his creditors, persons who purchased from him after the wife's death can claim only his title as tenant by the curtesy, though the record of the deed to the wife had been destroyed by fire, and her heirs had neglected to have the record supplied, as the husband never had any title, except through his wife, whose title he could not dispute and his vendees got only what he had.—STEVENS v. GLASS, Ky., 60 S. W. Rep. 339.

39. DEED—Equitable Mortgage — Fraud.—Where a conveyance is made by a debtor to a creditor to secure the latter in what he owes him, and for what he is liable for him as surety, and for such indorsements as he may make for him, and the conveyance is taken by the creditor in good faith, for his own security and no other purpose, such conveyance is an equitable mortgage, and cannot be set aside as a fraud on creditors, though the motive of the grantor may have been to hinder and delay his creditors.—HEGLER v. GROVE, Ohio, 59 N. E. Rep. 162.

40. DEEDS — Streets—Fee — Easements.—Where a deed from the original owners of certain lots reserved the fee of the street in front thereof, a party holding under the grantees took subject to such reservation, irrespective of any reservation in the recorded plat of such lots, and had no fee in such street.—BRUMIT v. VIRGINIA & S. W. R. CO., 60 S. W. Rep. 505.

41. DEEDS—Vendor's Lien — Rescission.—Where a deed conveying certain lands reserved an express lien to secure the payment of one of several purchase-money notes, and he deed was redelivered to the vendor as rescinding the sale, such deed was executory by reason of above reservation, and the redelivery operated as a rescission, and canceled the notes as between the parties; hence one holding in privity to the vendor could not recover thereon.—TERHUNE v. FIRST NAT. BANK OF LADONIA, Tex., 60 S. W. Rep. 352.

42. DEEDS—Words of Inheritance — Restraining Alienation.—Where the granting clause of a deed did not contain words of inheritance, but it was recited that the conveyance was made for the sole use of the grantee and of her heirs, and that she was not to have the privilege of conveying or incumbering it, the grantee took an absolute estate, and not as trustee for her heirs, then living, since by Code, § 2913, a fee may be created without the word "heirs," and the provision as to the heirs was not inconsistent with a fee, and the condition imposed, being repugnant to the grant of the fee, was void.—TEANEY v. MAINS, Iowa, 84 N. W. Rep. 956.

43. EMINENT DOMAIN—Condemnation of Right of Way.—On condemnation of land by a railroad company for a right of way, that horses being worked on the land may become frightened by trains being properly operated cannot be considered by the jury to enhance the owner's damages by reason of the appropriation of the land, as such damages are speculative, and not the proper subject of injury.—CHICAGO, I. & E. RY. CO. v. MASON, Ind., 59 N. E. Rep. 185.

44. EQUITY—Laches.—The doctrine of laches, when applied to refusals of the courts to enforce stale demands, is governed in a great measure by the peculiar circumstances surrounding each case, by the nature of the claim, and whether the delay has been unnecessary and unreasonable. The doctrine is based upon grounds of public policy, which, for the peace of society, demand the discouragement of stale claims.—ST. PAUL, ETC. RY. CO. v. ECKEL, Minn., 84 N. W. Rep. 1009.

45. EVIDENCE—Handwriting — Comparison.—In this State, in an action involving the genuineness of a signature, only such papers as are admitted in evidence in the case for other purposes, and such as are admitted to be genuine, should, except in very exceptional cases, be admitted for the purpose of comparison.—BANE v. GUINN, Idaho, 63 Pac. Rep. 634.

46. EVIDENCE—Parol Evidence—Written Contract.—Where a writing is incomplete, and it appears upon its face that the parties did not intend it to be a complete statement of the whole contract between them, parol evidence is competent to prove the existence of any separate agreement as to any matter on which the writing is silent, and which is not inconsistent with its terms.—POTTER v. EASTON, Minn., 84 N. W. Rep. 1011.

47. EXECUTIONS — Defective Advertisement—Second Levy.—Where, after sale on execution and delivery of a sheriff's deed acknowledging the receipt of the purchase money, it being discovered that the advertisement of the sale was defective, and before the return day of the execution another levy was made, the deed on the second sale was not invalid on the ground that, as the recital in the first acknowledged payment, the execution was satisfied, since there can be no satisfaction until a good title has been given the purchaser at the sale.—EAST GREENWICH INST. FOR SAVINGS v. ALLEN, R. I., 47 Atl. Rep. 886.

48. FEDERAL COURTS—Jurisdiction—Federal Question.—An action by a tribal Indian, living on a reservation, to recover damages for his arrest by defendants for violation of a State statute, on the ground that such statute was not applicable to the plaintiff, involves a construction of the laws and treaties of the United States, and is of federal cognizance.—Y-TA-TAH WAH v. REBOCK, U. S. C. C., N. D. (Iowa), 105 Fed. Rep. 257.

49. FEDERAL COURTS—Transfer of Causes—Construction of Statute.—In Act March 2, 1899 (30 Stat. 1002), es-

tablishing a division of the circuit court in the western district of Texas, at Laredo, and providing that pending suits against parties residing in certain counties may be transferred to such division "on the application of either party," the words "either party" refer to all the individuals upon the one side or the other of the suit, and a suit can only be transferred on the application of all the plaintiffs or defendants.—MEXICAN NAT. COAL, TIMBER & IRON CO. v. MACDONELL, U. S. C. C., W. D. (Tex.), 105 Fed. Rep. 266.

50. FRAUDS, STATUTE OF—Waiver.—The defense of the statute of frauds is not waived if not pleaded. It is sufficient for the defendant to deny the alleged promise, without making any reference to the statute. The plaintiff must then establish the alleged promise by legal evidence. If, however, the answer admits the promise, it must also plead the statute, or it is waived.—BEAN v. LAMPREY, Minn., 84 N. W. Rep. 1016.

51. FRAUDULENT CONVEYANCES—Constructive Fraud. —Where a brother and sister lived together on the same farm, a sale of personal property by the brother to the sister was valid as to creditors, though the property was not removed from the farm, there being a change of possession without such removal.—HAMILTON v. COMBS' ADMR., Ky., 60 S. W. Rep. 371.

52. FRAUDULENT CONVEYANCES—Voluntary Conveyance.—Under Code, § 3775, authorizing the court to grant any relief warranted by the evidence and within the issues, the pleadings, in a suit to set aside a fraudulent conveyance from a husband to his wife, to which the wife pleads that the property was sold for the husband's debts, and purchased by a third party and conveyed to her, and the plaintiff alleged that such latter transfer was a mortgage, and was satisfied by the property of the husband, are sufficient to sustain a decree subjecting such land to the husband's debts, without a prayer for the cancellation of the second deed.—STUBBLEFIELD v. GADD, Iowa, 84 N. W. Rep. 917.

53. GIFT—Delivery — Presumption.—Where a husband delivers to his wife the property itself, or the evidences of title thereto, the relationship may raise a presumption that the transaction was a gift, but where there is no such delivery there is no such presumption.—GETCHELL v. BIDDEFORD SAV. BANK, Me., 47 Atl. Rep. 895.

54. HIGHWAYS—Duties of Traveler—Defects.—There is no rule of law which obliges a person upon the highway to keep his eye, under all circumstances, constantly upon the road before him, that he may avoid injury from any defect therein. He may ordinarily presume that the road is in fit condition to travel. In other words, he is not obliged to presume negligence on the part of those whose duty it is to keep the highway in repair.—MAHNKE v. NEW ORLEANS CITY & L. R. CO., La., 29 South. Rep. 52.

55. HIGHWAYS—Establishment—User.—In order that a highway may be established by public user, the user must be under a claim of right, adversely, uninterruptedly, and substantially, by way of a defined road, for the period prescribed by limitations beyond which actions for the recovery of real property cannot be maintained.—BAYARD v. STANDARD OIL CO., Oreg., 63 Pac. Rep. 614.

56. HOMESTEAD—Exemption of Separate Tracts.—Where a debtor's dwelling house and the tract of land on which it stands are worth less than $1,000, he may make up his homestead exemption out of another tract, which is used as a part of the homestead, though the two tracts do not adjoin.—DONALDSON v. RICHART, Ky., 60 S. W. Rep. 405.

57. HOMESTEAD—Surviving Husband.—A right of homestead, once acquired, inures to the benefit of a surviving husband, though the survivor be no longer the head of the family.—LELAND v. CHAMBERLIN, Tex., 60 S. W. Rep. 435.

58. HUSBAND AND WIFE — Community Property.—Where a husband and wife seek to enjoin the enforcement of a judgment against the former on land held in the wife's name on the ground that the land, which appeared from the deed to the wife to be community property, was in fact her separate property, having been purchased with the proceeds of her separate property, which had been appropriated by the husband, it was error to charge that the property was subject to the judgment, unless the husband had agreed to repay the wife for the property so appropriated.—THOMPSON v. WILSON, Tex., 60 S. W. Rep. 354.

59. HUSBAND AND WIFE — Fraudulent Conveyance—Estoppel.—Where a conveyance of land by a husband to his wife was set aside at the suit of judgment creditors of the husband as being fraudulent in law, but not in fact, the wife is not equitably estopped from claiming a homestead in the land by participation in the conveyance.—ROSENBAUM v. DAVIS, Tenn., 60 S. W. Rep. 497.

60. HUSBAND AND WIFE—Separation—Arbitration.—Where a husband and wife, having agreed upon an immediate permanent separation, further agreed to leave to arbitrators the matters of settlement of alimony and custody and support of their children, the agreement was binding, and the award of the arbitrators will be enforced.—MASTERSON v. MASTERSON, Ky., 60 S. W. Rep. 301.

61. INSOLVENCY—Preference.—A mortgage given by a debtor to secure a debt to a prior existing creditor, which has not been recorded at least three months prior to commencement of insolvency proceedings, is dissolved by Rev. St. ch. 70, § 33, notwithstanding it has passed into the hands of a *bona fide* purchaser.—BOYD v. PARTRIDGE, Me., 47 Atl. Rep. 911.

62. INSURANCE — Agents — Additional Insurance. — Where an insurance company issued a policy on certain property while its agent who procured the risk knew that a certain other policy was to be obtained on the same property, it consented to the additional insurance, and its policy was not void in consequence thereof, since the agent's knowledge was the knowledge of the company.—INDEPENDENT SCHOOL DIST. OF DOON v. FIDELITY INS. CO., Iowa, 84 N. W. Rep. 956.

63. INSURANCE—Rescission of Contract.—A provision of an insurance policy giving either party the right to cancel the same on thirty days' notice to the other does not prevent the parties from rescinding the contract by mutual consent at any time without such notice.—SEA INS. CO. OF LIVERPOOL, ENGLAND, v. JOHNSTON, U. S. C. C. of App., Fifth Circuit, 105 Fed. Rep. 286.

64. JUDGMENT — Husband and Wife. — A judgment cannot be rendered against a married woman in an action on notes executed by her and her husband, where the notes were not executed for necessities to her or family, or for the preservation of her separate estate, since she could not bind herself for their payment.—NOEL v. CLARK, Tex., 60 S. W. Rep. 356.

65. JUDGMENTS—Res Judicata.—Where plaintiff alleged in a former action that he had performed certain services for a defendant under an express contract for a certain salary, and an agreement for a percentage of profits on all sales above a certain amount, a decision that there was a contract for a fixed annual salary, and no agreement for compensation beyond that, was a bar to an action to recover the reasonable value of the services.—YOUNG v. FARWELL, N. Y., 59 N. E. Rep. 143.

66. LANDLORD AND TENANT — Injury by a Third Person.—The owner of a building may sue a third person for injury to it, though it be in the possession of a lessee, who is also liable to the owner on an obligation to restore the property to him at the end of the term in a reasonably good condition. — VANCE v. SAN ANTONIO GAS CO., Tex., 60 S. W. Rep. 317.

67. LIFE INSURANCE—Paid-Up Policy.—Where a policy of insurance provided that, if the policy should

lapse for the non-payment of any premium, the company would, upon the surrender of the policy within six months after such lapse, issue a paid-up policy, the insured, after paying five annual premiums, was entitled to a paid-up policy, though he did not apply therefor for nearly five years after making default in the payment of the sixth premium; time not being of the essence of the contract.—MANHATTAN LIFE INS. CO. V. PATTERSON, Ky., 60 S. W. Rep. 388.

68. LIMITATIONS—Fraud.—The statute commences to run against an action for money obtained by fraud from the time the transaction is completed by the receipt of the money, where nothing is thereafter done by the person receiving it to prevent inquiry and discovery of the fraud.—SMITH V. BLACHLEY, Pa., 47 Atl. Rep. 985.

69. MARRIED WOMEN—Separate Use Trust.—A will giving the proceeds of real estate to J, wife of H, for her sole and separate use, independently of her present or any future husband, creates a separate use trust, which is not changed by her electing the land instead of the proceeds.—HOLLIDAY V. HIVELY, Pa., 47 Atl. Rep. 988.

70. MARRIED WOMEN—Validity of Judgment.—Under the act of March 15, 1894, empowering married women to contract and to sue and be sued, a judgment against a married woman is valid, though rendered upon a note which was void because executed before that statute took effect.—HOWARD V. GIBSON, Ky., 60 S. W. Rep. 491.

71. MECHANICS' LIENS—Lien of Material-Man.—One who furnishes materials to a contractor, but fails to comply with the statute, acquires no lien against the property.—JAMES V. ST. PAUL'S SANITARIUM, Tex., 60 S. W. Rep. 322.

72. MECHANICS' LIEN—Principal and Surety—Actions.—Where an action was brought on a bond given by a contractor to a subcontractor to procure the discharge of a mechanic's lien in favor of the latter, the failure of the contractor to defend does not preclude his sureties from pleading any defense which is open to the contractor.—ARSCHLIMANN PRESBYTERIAN HOSPITAL, N. Y., 59 N. E. Rep. 148.

73. MECHANICS' LIEN—Time for Filing.—Rev. St. art. 3295, provides that, to secure a mechanics' lien, an original contractor shall file his contract or his account in the county clerk's office within four months after the indebtedness accrued, and that other persons shall so file their claims within 30 days. Article 3369 provides that such indebtedness shall be deemed to accrue at the date of the last delivery of material. Held, that where the last delivery of material by a lumber dealer to an owner was on March 22d, an account filed by the lumber dealer on July 20th was in time to secure a lien.—J. H. BAXTER LUMBER CO. V. NICKELL, Tex., 60 S. W. Rep. 451.

74. MORTGAGES—Failure to Release—Penalty.—Under Horner's Rev. St. 1897, § 1091a, prescribing a penalty where any person holding any recorded mortgage, or the officer of any corporation owning any such mortgage, on request shall refuse to release it of record when the debt it secured has been paid, the corporation owning such a mortgage cannot be subjected to the penalty for failure to release, as the corporation acts through its officers, and such section was intended to punish the officers.—SOUTHERN INDIANA LOAN & SAVINGS INST. V. DOYLE, Ind., 59 N. E. Rep. 178.

75. MORTGAGE—Notes—Assignment—Lien—Priority.—Where parties held a series of notes secured by a lien, and assigned four of them absolutely, and not for collection merely, such assigned notes had precedence over the others as to the security for the payment of all, and the assignee of the four notes was not obliged to take up the whole series in order to have the benefit of the lien.—DILLEY V. FREEDMAN, Tex., 60 S. W. Rep. 448.

76. MUNICIPAL CORPORATIONS—Fire-Limit Ordinance—Injunction.—Injunctions will lie to prevent an incorporated town from removing a building as an alleged violation of a fire limit ordinance, since there is no adequate legal remedy for a wrongful removal thereof.—LEMMON V. TOWN OF GUTHRIE CENTER, Iowa, 84 N. W. Rep. 986.

77. MUNICIPAL CORPORATIONS—Officers—Quarantine Regulations—Damages.—Under Rev. St. arts. 4328, 4330, which make health officers of a city officers of the State, and hence vest them with functions of interest to the public at large, a city is not liable in damages for the negligence or misconduct of such officers in enforcing quarantine regulations.—WHITE V. CITY OF SAN ANTONIO, Tex., 60 S. W. Rep. 426.

78. NEGLIGENCE—Druggists—Selling Patent Medicines.—A druggist is not required to analyze the contents of each bottle or package of a patent or proprietary medicine which he gets from the manufacturer. If he delivers it to a customer calling for it with the label of the proprietary or patentee on it, he is not negligent.—WEST V. EMANUEL, P.., 47 Atl. Rep. 965.

79. NEGLIGENCE—Evidence—Presumptions.—An instruction that the law presumes, until the contrary is shown, that a person injured, prompted by a natural instinct to avoid danger, exercised care, which presumption will prevail unless overcome by evidence that he was negligent, is erroneous, as throwing the burden on defendant to show contributory negligence.—BELL V. INCORPORATED TOWN OF CLARION, Iowa, 84 N. W. Rep. 962.

80. NEGLIGENCE—Railroad Crossing.—Where one who hired and rode in an open carriage acquiesced, when in a dangerous place, in the negligence of the driver thereof, which resulted in the former's fatal injury, he was guilty of contributory negligence, since his hiring the outfit did not excuse his failure to exercise common prudence.—ILLINOIS CENT. R. CO. V. MCLEOD, Miss., 29 South. Rep. 76.

81. NEGLIGENCE—Sawmills on Highways.—It is not negligence *per se* to erect and operate a sawmill along a public highway. Where, in an action for injury caused by the operation of a mill near a highway, the jury found for the defendant, who owned and operated the mill, error in instructing peremptorily in favor of the owner of the land, and others who helped to operate the mill, became harmless.—GOODIN V. FUSON, Ky., 60 S. W. Rep. 298.

82. NUISANCE—Estoppel.—The fact that when one purchased land he knew of the existence thereon of a nuisance, consisting of the discharge thereon of refuse from a neighboring creamery, under an alleged easement, would not estop him from maintaining proceedings to abate the nuisance.—VAN FOSSEN V. CLARK, Iowa, 84 N. W. Rep. 989.

83. PARENT AND CHILD—Agency—Necessaries.—A minor son living with and supported and educated at the expense of his father is not presumed to be his father's agent in procuring tutoring in vacation, though an education is a necessity, and the tutor cannot recover for his services in the absence of any contract with the father.—PEACOCK V. LINTON, R. I., 47 Atl. Rep. 887.

84. PARENT AND CHILD—Custody.—Where children were left in their grandmother's care at their mother's death, remaining with her for 10 years, during which time their father regularly contributed to their needs and visited them, there was was no such abandonment by him as would deprive him of his right to their custody; and hence he was entitled to reclaim them by *habeas corpus* proceedings against their aunts, who claimed their custody by virtue of adoption proceedings begun without the father's knowledge, and also by virtue of the father's consent, given at the request of his dying wife.—HIBBETTE V. BAINES, Miss., 29 South. Rep. 80.